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IN THE

Supreme Court of the United States

No. 191—OCTOBER TERM, 1962

JULIA IOANNOU,

Appellant,

vs.

NEW YORK ET AL.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The appellee, State of New York, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal taken herein from the order of the Court of Appeals of the State of New York, be dismissed or, in the alternative, that such order be affirmed.

Opinions Below

No opinion was written by the New York Court of Appeals. 11 N. Y. 2d 740. The Appellate Division of the Supreme Court, First Judicial Department, too, wrote no opinion. 13 A. D. 2d 917. The Surrogate's Court, New York County, wrote a single sentence memorandum which is not officially reported, but is included in the Jurisdictional Statement (Appendix, p. 23).

Jurisdiction

Jurisdiction is invoked under 28 U.S.C. § 1257, subdivision 2.

Question Presented

The question which the appellant seeks to present is whether New York Surrogate's Court Act, § 269 (now 269-a, subdivision 1) has been applied unconstitutionally. Under section 269, where it appears to the Surrogate that a legatee, distributee or beneficiary would not have the benefit or use or control of the money or other property due him, the Surrogate may direct its payment into Court.

The appellant asserts that the section becomes repugnant to the Fourteenth Amendment of the Constitution of the United States when it is applied to inhibit the assignment, by an instrument allegedly executed voluntarily by a Czechoslovakian distributee of a New York estate in the United States Embassy in Prague, Czechoslovakia, of her interest in a New York estate deposited pursuant to such statute.

The appellant (Jur. Statement, pp. 4-5) claims that non-recognition of the assignment deprives her and her assignor of equal protection of the law and due process, because it treats them differently from other distributees of New York decedents "who may voluntarily assign their interests" and gives no effect to the hearing which the appellant claims established the voluntary character of the gift.

The Statute Applied

Surrogate's Court Act, § 269, whose application has been brought into question, merely provides for the payment into court of money or property, for the benefit of a legatee, distributee or beneficiary of a trust, or such persons as may thereafter appear to be entitled thereto, of money or property due him, where "it shall appear that such legatee, distributee or beneficiary" would not have the benefit or use or control of the money or other prop-

erty due him, or where other special circumstances make it desirable that such payment should be withheld (L. 1939, ch. 343).

A legislative note indicates that Section 269 was enacted at the request of the Executive Committee of the New York State Surrogates' Association and that its purpose was to authorize the deposit of moneys or property in the Surrogate's Court where transmission to a beneficiary, legatee, or other person resident in a foreign country might be circumvented by confiscation in whole or in part. The section was designed to authorize the impounding of the fund by the Surrogate to await the time when payment could be made "to the beneficiary for his own benefit, use and control" (Gilbert-Bliss, Civil Practice Act of New York, Vol. 13 B, p. 155, recompiled 1952).

In 1960, the section was amended by adding to it a second subdivision, placing upon any non-resident alien legatee, distributee or beneficiary of a trust, the burden of proving, in any proceeding to obtain the money, that he would have the benefit or use or control of the money or other property due him. The provisions of the subdivision relating to such burden of proof were expressly made applicable to any person "claiming from, through or under" such non-resident alien (L. 1960, ch. 975).

Statement

1.

By the terms of a decree of the New York Surrogate's Court, Bronx County, entered June 27, 1956, it was determined that one Viktoria Miculka was a distributee of the decedent, Alexander Marek; that the distributee resided in Czechoslovakia; and that, since it appeared improbable that she would have the beneficial use and enjoyment of her distributive share, $11,631.76, it should be deposited

with the Treasurer of the City of New York, subject to further order of the Surrogate's Court (fols. 25-30).

No appeal was taken from such order.

2.

Thereafter, on April 11, 1958, the petitioner-appellant instituted a proceeding in the Surrogate's Court, as an alleged assignee of the distributee, to withdraw the funds on deposit (18-24, 34-36). At the time of the alleged assignment, the distributee and her three living children still resided in Czechoslovakia (147).

In her petition to withdraw the money, the petitioner alleged that the distributee, Viktoria Miculka, had on May 13, 1957, of her own free will and without duress of any kind on the part of the Czechoslovakian governmmental authorities, assigned her interest in the deposit to the petitioner. The petitioner also alleged that the fund on deposit would not come into the possession of the government of Czechoslovakia or any other foreign nation (22).

3.

A general denial was interposed by the New York Attorney General to the allegations of the petition. It admitted only that a document was attached to the petition which purported to be an assignment to the petitioner of the funds involved herein (37-39).

4.

A *hearing* was held before the New York County Surrogate (40-198). At the hearing, counsel for the petitioner recognized that he was under a burden to show a "change of circumstances" from the date of the deposit and distinguished *Matter of Geiger*, 7 N. Y. 2d 109 (1959), on the ground that the Surrogate had found "no change in the

situation in Hungary'' to justify the assignment there (45-46). The proof at the hearing, nevertheless, was *not* directed to any showing of any change of circumstances in Czechoslovakia, the country here involved (57). The petitioner's proof was directed only to a showing that the alleged assignment had been executed voluntarily by the petitioner's assignor, without the knowledge or control of the government of Czechoslovakia, at the United States Embassy (162). At most, the evidence showed that the petitioner and her assignor had agreed to what amounted to a subterfuge, an assignment of the funds to a person who resided in England, upon her agreement to ''continue'' to send ''presents'' to the assignor (133-134, 141, 151-152).

ARGUMENT

No substantial federal question is presented by this appeal.

The application of Surrogate's Court, § 269, to preserve in the custody of the New York County Surrogates' Court, the funds due to a non-resident Czechoslovakian distributee, was constitutional.

Nor was it unconstitutional for the Surrogate to refuse to give effect to an assignment of the fund where there had been no proof that, since the deposit of the fund in Court, there had been any substantial change of conditions in Czechoslovakia.

1.

In *Matter of Braier*, 305 N. Y. 148 (1953), app. dism. *sub nom. Kalmane* v. *Green*, 346 U. S. 802 (1953), the constitutionality of Surrogate's Court Act, § 269, was sustained. The section has been construed not to impair, but to protect the rights of non-resident alien legatees or distributees. 305 N. Y. 148, 158. Due process is, therefore, not violated.

2.

In *Matter of Geiger*, 7 N. Y. 2d 109 (1959), an effort to avoid the terms of the statute, and to procure a partial distribution of the funds being preserved by the Surrogate, by the device of an assignment of 25% of certain beneficiaries' shares, was held to be inffective. The decedent's distributees in the *Geiger* case resided in Hungary. Since the New York Court of Appeals opinion in *Geiger* has been reproduced by the appellant (Br., p. 23), we need point out only that in *Geiger*, as in an earlier case cited therein, *Matter of Herz*, 7 Misc. 2d 217 (Surr. Ct., Nassau Co., 1957), the Court found that there had been no proof that circumstances had changed in Hungary from the time the money had been deposited in Court (7 N. Y. 2d *supra*, 111-112). The assignment was regarded as one made by a person who did not have the "beneficial use or control" of the property *in custodia legis* (p. 112). The Court of Appeals wrote (p. 112):

> "So long as the distributive shares are property being withheld by the Surrogate because of the special circumstances in which the beneficiaries find themselves as domiciliaries in an iron-curtain country, they are in no position presently to assign any part of the funds withheld. They may not place an assignee in a better position than they themselves enjoy as principals."

3.

Section 269 is not an escheat statute. Accordingly, *Kolovrat* v. *Oregon*, 366 U. S. 187 (1960), which the appellant (p. 12) states involved a "similar statute", has no bearing. In *Kolovrat*, this Court merely held that Oregon could not, in the face of a United States treaty with Yugoslavia, entitling citizens and residents of Yugoslavia to inherit personal property from their American relatives, under an Oregon statute, declare an escheat and prevent

residents and citizens of Yugoslavia from inheriting the property of two Oregon residents. Section 269 is not alleged to be in conflict with any treaty made by the United States. No question of treaty supremacy is involved here.

4.

Section 269 does not deny equal protection of the law to any legatees, distributees or beneficiaries. It affects *all* non-resident alien persons who would not have the sole beneficial use or control of their distributive shares, or whose shares would be subject to confiscation in whole or in part. Devious attempts to withdraw funds from the protection of the Surrogates Courts have been thwarted, whether by "power of attorney", as in *Matter of Weidberg*, 172 Misc. 524 (1939) and *Matter of Getream*, 200 Misc. 543 (1951); or by "assignment", as in *Matter of Geiger* (*supra*); *Matter of Perlinsky*, 202 Misc. 351 (1952); *Matter of Mark*, 115 N.Y.S. 2d 174 (1952), not officially reported; and in *Matter of Eretsian*, 23 Misc. 2d 999 (1960).

Absent a determination that conditions (relating to government policy) have so changed in Czechoslovakia that the distributee herself could have the full benefit, use or control of her interest in the estate, her funds remain protected even against any impulse the distributee may have to "assign" away her interest. New York clearly has the power to protect the "assignor", under unchanged national conditions, from giving away her heritage for a mess of pottage (140).

We submit that there is nothing in this record to show that even the mess of pottage (possible gifts of candy from the assignee for the assignor's sweet tooth) may not be subject to confiscation. Under the circumstances, the record is barren of any proof that Surrogate's Court Act, § 269, has been applied unconstitutionally.

CONCLUSION

Since, as in *Matter of Braier, supra,* no substantial federal question is presented, this Court should dismiss the appeal herein or affirm the order appealed from.

Dated: New York, N. Y., August 15, 1962.

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APPENDIX

Surrogate's Court Act, 269-a (formerly § 269)

§ 269-a. Deposit in court for benefit of legatee, distributee or beneficiary. 1. Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction.

2. In any such proceeding, where it is uncertain that an alien legatee, distributee or beneficiary of a trust, not residing within the United States or its territories, would have the benefit or use or control of the money or other property due him, the burden of proving that such alien legatee, distributee or beneficiary of a trust will receive the benefit or use or control of the money or other property due him shall be upon him or on the person or persons claiming from, through or under him.